

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVE EIDEN,

Plaintiff,

v.

HOME DEPOT USA, INC., dba
HOME DEPOT #6609; and HD
PROPERTIES OF MARYLAND,

Defendants.

NO. CIV. S-04-977 LKK/CMK

O R D E R

Plaintiff, Steve Eiden, sues defendant, Home Depot, pursuant to the American with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. ("ADA"). He also asserts state law claims.¹ Defendant moves for summary judgment asserting that plaintiff's suit is moot by virtue of its remedial efforts, while plaintiff cross-moves on

¹ Plaintiff brings claims pursuant to Health and Safety Code Part 5.5 (California Health and Safety Code §§ 19955 et seq.), the Unruh Act (California Civil Code §§ 51 et seq.), the Disabled Persons Act (California Civil Code §§ 54 et seq.), the Unfair Business Practices Act (California Business and Professions Code §§ 17200 et seq.), and Negligence (California Civil Code § 1714).

1 his ADA and Unruh Act claims. Pl.'s Mot. at 2. I decide the
2 matter based on the pleadings, the parties' papers, and after oral
3 argument.

4 **I.**

5 **FACTS²**

6 Plaintiff is a paraplegic who uses a wheelchair for
7 mobility. He is unable to walk, and has limited use of his arms.
8 Pl.'s SUF 1; Def.'s SUF 16. Eiden has patronized the Home Depot
9 located at 2580 Notre Dame Boulevard in Chico, California, for the
10 past five-to-six years, and visits the store approximately two-to-
11 three times a month. Pl.'s SUF 2. Eiden contends that he has
12 encountered a number of barriers that have made it difficult for
13 him to fully access the facility. Pl.'s SUF 4.

14 On May 20, 2004, plaintiff filed a complaint, which alleges
15 that he encountered "architectural barriers that denied him full
16 and equal access." Compl. at 4. Attached to his complaint is a
17 list of barriers, which he claims were the barriers "known by
18 [him]." Ex. A to Pl.'s Compl. The complaint identifies the
19 following thirteen "barriers":

20 (1) Tow-Away Signage at Parking Lot Entrance is difficult to
21 read;

22 (2) The cross-slope of the route of travel from public
23 streets, sidewalks, and transportation exceeds 2%, and is
24 7,3%;

25 (3) There is no directional signage along the route of travel
26 from the public streets or sidewalks to the building
entrance;

² Facts are undisputed unless otherwise noted.

1 (4) There are no detectable warnings at the route for a
2 person in a wheelchair traveling through vehicle areas to
reach the ramp;

3 (5) The accessible parking spaces are not dispersed and
4 located closest to the accessible entrances;

5 (6) Shopping carts were left in disabled parking spaces and
access aisles creating an obstruction;

6 (7) The words "NO PARKING" are not painted in the access
7 aisles;

8 (8) The ISA signage on the entrance door is only 36 inches
above ground, making it difficult to see;

9 (9) Some aisles in the store were obstructed by merchandise
10 narrowing the width of the aisles;

11 (10) The sales counter is too high, 44 inches in height at
the customer service desk;

12 (11) There were no accessible check stands, and signage
13 identifying accessible checkout aisle was not mounted on
checkout locations;

14 (12) The compartment stall door in the men's restroom does
15 not have a loop or U-shaped handle under the latch;

16 (13) The toilet paper dispenser projects 5 inches from the
17 wall, and is set above the grab bar and in the space a person
in a wheelchair needs for an approach to the toilet.

18 Plaintiff claims that subsequent to filing this action, he
19 returned to defendant's premises in September 2004, and that
20 despite his complaints, Home Depot failed to correct the
21 architectural barriers. Pl.'s SUF 5, 6.

22 On July 13, 2005, plaintiff asked his expert, Joe Card
23 ("Card"), to visit the Home Depot in order to identify the
24 architectural barriers that violate the ADA and to create a report.
25 Pl.'s SUF 19. Card identified the architectural barriers Eiden
26 alleged in his complaint, but also identified additional barriers

1 which Eiden did not previously note. Eiden claims he "now has
2 notice" of those barriers. Pl.'s SUF 19.

3 On August 23, 2005, defendant filed for summary adjudication,
4 arguing that the suit is moot because defendant allegedly
5 eliminated the violations complained of in Eiden's complaint.
6 Def.'s Mot. at 1. Plaintiff opposed this motion and moved for
7 further discovery under Fed. R. Civ. P. 56(f). On September 14,
8 2005, the court granted this request so that plaintiff's expert
9 could return to the Home Depot "to determine if the previously
10 identified ADA violations have been removed." September 14, 2005
11 Order at 3.

12 Card returned to defendant's premises for an inspection on
13 October 7, 2005. Plaintiff's counsel instructed Card to "reinspect
14 the location and document any corrections made to the violations
15 that were identified in the first report." Card Dec. at 2. Card,
16 however, identified a myriad of other barriers which were not
17 previously identified by plaintiff in his complaint. See Card
18 Dec. 2-5; Ex. A to Card Dec. Discovery closed on October 4, 2005
19 pursuant to the court's scheduling order.

20 It is undisputed that certain conditions have been remediated.
21 The parties, however, dispute whether a number of other barriers
22 remain.

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II.

STANDARDS

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Secor Limited v. Cetus Corp., 51 F.3d 848, 853 (9th Cir. 1995).

Under summary judgment practice, the moving party

[A]llways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance,

1 summary judgment should be granted, "so long as whatever is before
2 the district court demonstrates that the standard for entry of
3 summary judgment, as set forth in Rule 56(c), is satisfied." Id.
4 at 323.

5 If the moving party meets its initial responsibility, the
6 burden then shifts to the opposing party to establish that a
7 genuine issue as to any material fact actually does exist.
8 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
9 586 (1986); See also First Nat'l Bank of Ariz. v. Cities Serv. Co.,
10 391 U.S. 253, 288-89 (1968); Secor Limited, 51 F.3d at 853.

11 In attempting to establish the existence of this factual
12 dispute, the opposing party may not rely upon the denials of its
13 pleadings, but is required to tender evidence of specific facts in
14 the form of affidavits, and/or admissible discovery material, in
15 support of its contention that the dispute exists. Fed. R. Civ.
16 P. 56(e); Matsushita, 475 U.S. at 586 n.11; See also First Nat'l
17 Bank, 391 U.S. at 289; Rand v. Rowland, 154 F.3d 952, 954 (9th Cir.
18 1998). The opposing party must demonstrate that the fact in
19 contention is material, i.e., a fact that might affect the outcome
20 of the suit under the governing law, Anderson v. Liberty Lobby,
21 Inc., 477 U.S. 242, 248 (1986); Owens v. Local No. 169, Assoc. of
22 Western Pulp and Paper Workers, 971 F.2d 347, 355 (9th Cir. 1992)
23 (quoting T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,
24 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine,
25 i.e., the evidence is such that a reasonable jury could return a
26 verdict for the nonmoving party, Anderson, 477 U.S. 248-49; see

1 also Cline v. Industrial Maintenance Engineering & Contracting Co.,
2 200 F.3d 1223, 1228 (9th Cir. 1999).

3 In the endeavor to establish the existence of a factual
4 dispute, the opposing party need not establish a material issue of
5 fact conclusively in its favor. It is sufficient that "the claimed
6 factual dispute be shown to require a jury or judge to resolve the
7 parties' differing versions of the truth at trial." First Nat'l
8 Bank, 391 U.S. at 290; See also T.W. Elec. Serv., 809 F.2d at 631.
9 Thus, the "purpose of summary judgment is to 'pierce the pleadings
10 and to assess the proof in order to see whether there is a genuine
11 need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R.
12 Civ. P. 56(e) advisory committee's note on 1963 amendments); see
13 also International Union of Bricklayers & Allied Craftsman Local
14 Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir.
15 1985).

16 In resolving the summary judgment motion, the court examines
17 the pleadings, depositions, answers to interrogatories, and
18 admissions on file, together with the affidavits, if any. Rule
19 56(c); See also In re Citric Acid Litigation, 191 F.3d 1090, 1093
20 (9th Cir. 1999). The evidence of the opposing party is to be
21 believed, see Anderson, 477 U.S. at 255, and all reasonable
22 inferences that may be drawn from the facts placed before the court
23 must be drawn in favor of the opposing party, see Matsushita, 475
24 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654,
25 655 (1962) (per curiam)); See also Headwaters Forest Defense v.
26 County of Humboldt, 211 F.3d 1121, 1132 (9th Cir. 2000).

1 Nevertheless, inferences are not drawn out of the
2 air, and it is the opposing party's obligation to produce a factual
3 predicate from which the inference may be drawn. See Richards v.
4 Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
5 aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

6 Finally, to demonstrate a genuine issue, the opposing party
7 "must do more than simply show that there is some metaphysical
8 doubt as to the material facts. . . . Where the record taken as a
9 whole could not lead a rational trier of fact to find for the
10 nonmoving party, there is no 'genuine issue for trial.'" Matsushita,
11 475 U.S. at 587 (citation omitted).

12 III

13 PRELIMINARY QUESTIONS

14 Pending before the court are cross-motions for summary
15 judgment filed by both parties. Home Depot asserts that the
16 thirteen architectural barriers alleged in the complaint no longer
17 exist. It maintains that no live controversy exists, and thus,
18 "[p]laintiff's ADA claim must be dismissed." Defendant also
19 asserts that plaintiff lacks standing to maintain the other alleged
20 barriers. Def.'s Mot. at 1. Plaintiff cross-moves on the grounds
21 that defendant has failed to correct multiple barriers properly
22 before the court. Plaintiff argues, inter alia, that defendant's
23 motion should be denied because there remain barriers which "were
24 identified by plaintiff's expert, and which relate to plaintiff's
25 disability," thus making the case a live controversy. Pl.'s Mot.

26 ////

1 and Opp'n at 17.³

2 It is undisputed that a number of barriers alleged in
3 plaintiff's complaint were subsequently corrected by defendant.
4 The tow-away signage posted at the entrance to the store has
5 numbers that are two-and-a-half inches tall. Def.'s SUF 5.
6 Defendant additionally installed the ISA symbol to the right of the
7 double doors at all three entrances to the store at a height of 60
8 inches above the ground to the center of the sign. Home Depot
9 painted the words "no parking" on the pavement of the access aisles
10 to the van accessible parking lots." Def.'s SUF 7. Defendant
11 installed the ISA symbol above check out stand numbers one (1) and
12 six (6), as well as the check stand in the garden. A U-shaped
13 handle on the designated accessible stall in the men's restroom was
14 installed and the toilet paper dispenser was positioned so it does
15 not protrude more than four (4) inches from the wall. Def.'s SUF
16 13, 14.

17 Before addressing the merits of the case, however, I address
18 several threshold issues.

19 **A. WHICH CLAIMS ARE ACTIONABLE?**

20 Preliminary to resolving the motions, the court must first
21 determine which architectural barriers are properly before the
22 court. Plaintiff asserts claims based upon the thirteen barriers
23 alleged in his complaint and on those identified in the two Card
24

25 ³ Plaintiff has filed one brief which represents his motion
26 for summary judgment as well as his opposition brief to defendant's
motion for summary judgment.

1 expert reports. Defendant does not raise objections as to the
2 barriers alleged in plaintiff's complaint, but argues that
3 plaintiff lacks standing to bring suit as to the violations
4 discovered by Card and which were identified in his two reports.⁴
5 Below, I conclude that the violations identified in the first Card
6 report are actionable, but those contained in the second Card
7 report are not cognizable in the instant suit.

8 Defendant contends that plaintiff lacks standing to sue on
9 barriers that he did not personally encounter on his visits to Home
10 Depot. It contends that "at the time he filed his complaint, Eiden
11 was not aware of and had not been affected by the alleged
12 violations identified in the Card Report." Def.'s Rep. at 4.
13 Defendant asserts that allowing plaintiff to sue on the violations
14 in the reports would offend standing principles. Put simply,
15 defendant argues that plaintiff is not entitled to allege
16 violations which were not alleged in his original complaint, citing
17 Access Now, Inc. v. South Florida Stadium Corp., 161 F.Supp.2d
18 1357, 1366 (S.D. Fla. 2001)(holding that a plaintiff's mere entry
19 into the stadium did not automatically confer upon him a
20 presumption of injury from any and all architectural barriers in

21
22 ⁴ Before the close of discovery, Card first visited
23 defendant's premises on July 13, 2004 to identify barriers that
24 violate the ADA and other state law and to generate a report. From
that visit, Card identified a total of twenty-three barriers, some
of which appear to overlap with the thirteen barriers plaintiff
identified and some which are newly identified barriers.

25 On October 7, 2005, after the close of discovery, Card
26 returned to defendant's premises. As a result of that visit, Card
identified twenty-nine additional violations. See Card Dec. 2-5;
Ex. A to Card Dec.

1 the stadium). Defendant also relies on several cases which were
2 decided in this district. See Martinez v. Longs Drugs Stores,
3 Inc., 2005 WL 2072013, *4 (E.D. Cal. 2005) and White v. GMRI, Inc.,
4 CIV-S-04-0465 DFL/CMK (E.D. Cal. 2004).

5 Plaintiff, on the other hand, argues that in addition to the
6 barriers alleged in his complaint, he is entitled to assert claims
7 contained in his experts' two reports because "the ADA encompasses
8 all barriers that relate to that person's disability within the
9 *entire subject public accommodation*," not just the ones known to
10 plaintiff prior to filing the complaint. Pl.'s Repl. at 6
11 (emphasis in the original). Plaintiff also contends that he can
12 allege further architectural barriers following the filing of his
13 complaint, relying on Pickern v. Holiday Quality Foods, Inc., 293
14 F.3d 1133 (9th Cir. 2002). Pl.'s Repl. at 6.

15 The court recently had occasion to address the issue of
16 standing and the ADA in Wilson v. Pier 1 Imports, 413 F.Supp.2d
17 1130 (E.D. Cal. 2006). As in Wilson, defendant in the case at bar
18 relies on a standard offered in White/Martinez that this court
19 believes is "unduly restrictive," and thus, the court cannot adhere
20 to it. No purpose would be served by repeating the analysis
21 articulated in Wilson. With respect to the two Card reports,
22 nothing in the ADA requires plaintiff to have personally
23 encountered all barriers in order to seek an injunction to remove
24 those barriers.

25 Nor is plaintiff's suit limited to the barriers that he
26 alleged in his complaint. As this court previously explained,

1 "[o]nce plaintiff either encountered discrimination or learned of
2 the alleged violations through expert findings or personal
3 observation, he had 'actual notice' that defendant did not intend
4 to comply with the ADA." See Wilson, 413 F.Supp.2d at 1134. As
5 the court further noted,

6 "the injury-in-fact requirement of Article III standing
7 is easily satisfied by liberally construing it in this
8 context. All that is required is to recognize that the
9 injury suffered relative to later-discovered barriers is
the threat of being subjected to discrimination suffered
by virtue of the existence of barriers, whether or not
initially encountered."

10 Id.

11 Having explained that, as a general matter, plaintiff is not
12 bound by the specific ADA claims asserted in his complaint under
13 Constitutional standing principles, the court addresses defendant's
14 argument that plaintiff "should not be permitted to construe his
15 complaint as entirely generic and incorporate new factual
16 allegations without seeking amendment" as this would "read the
17 'fair notice' requirement out of Rule 8(a)." Def.'s Repl. at 4.
18 Indeed, although plaintiff's complaint need only state a "short and
19 plain statement of the claim showing that the pleader is entitled
20 to relief," see Fed. R. Civ. P. 8(a)(2), plaintiff must still
21 provide "fair notice" for specific claims not asserted in his
22 complaint.

23 The court finds that under the circumstances, the alleged
24 barriers in the first Card report are actionable, while the ones
25 contained in the second Card report are not. Card performed a site
26 inspection on July 13, 2005 and subsequently created a report based

1 on that inspection which identified architectural barriers that he
2 believed were in violation of the ADA Accessibility Guidelines and
3 the California Building Code. Card Dec. at 2 (September 12, 2005).
4 Defendant concedes that it was aware of these alleged barriers as
5 early as July 29, 2005, over two months before the close of
6 discovery.⁵ It appears to this court that an action on particular
7 barriers lies so long as "the parties and the court [were] able to
8 identify the alleged violations with reasonable certainty."

9 Independent Living Resources v. Oregon Arena Corp., 982 F.Supp.
10 698, 770 (D. Or. 1997); see also Parr v. L & L Drive-Inn
11 Restaurant, et al., 96 F.Supp.2d 105, 1083-84 (D. Haw. 2000)(citing
12 Independent Living Resources). Rule 8(a)'s "simplified notice
13 pleading standard relies on liberal discovery rules and summary
14 judgment motions to define disputed facts and issues and to dispose
15 of unmeritorious claims." Swierkiewicz v. Sorema N.A., 534 U.S.
16 506, 512 (2002). Where, as here, plaintiff discovered new alleged
17 violations during the discovery period that were not pled in the
18 complaint, but disclosed to defendant in sufficient time to permit
19 defendant to address them in discovery and by way of law and
20 motion, the court concludes plaintiff is not precluded from raising
21 these allegations on a motion for summary judgment or at trial.⁶

22 ////

24 ⁵ The court's scheduling order specified discovery would
25 close on October 4, 2005.

26 ⁶ That is not to say that amendment of the complaint is not
the better practice - clearly it is.

1 As for the barriers contained in the second Card report, the
2 court holds that they are not cognizable in this litigation because
3 defendant did not have sufficient notice that they would be an
4 element of plaintiff's law suit. It was not until three days *after*
5 the close of discovery, on October 7, 2005, that Card returned to
6 defendant's premises to determine whether the previously-identified
7 barriers were removed. Consistent with this court's order,
8 plaintiff's counsel instructed Card to "reinspect the location and
9 document any corrections made to the violations that were
10 identified in the first report." Card Dec. at 2. Rather than
11 reinspect the location and document any corrections previously
12 identified, Card identified twenty-nine other barriers which were
13 not previously identified by plaintiff in his complaint. See Card
14 Dec. 2-5; Ex. A to Card Dec. Because the court's scheduling order
15 made clear that discovery would close on October 4, 2005, plaintiff
16 is precluded from asserting any further ADA claims after this
17 deadline without the court's permission. Put differently, because
18 plaintiff did not provide fair notice to defendant of the new
19 violations, and because he did not comply with the court's
20 scheduling order, he cannot assert these violations now in his
21 motion for summary judgment, or at trial. To hold otherwise
22 undermines the whole thrust and purpose of scheduling orders. See
23 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604 (9th Cir. 1992)
24 ("A schedule shall not be modified except upon a showing of good
25 cause and by leave of the district judge") (quoting Fed. R. Civ.
26 P. 16(b)).

1 For the reasons explained above, the court holds that the
2 claims asserted in the first Card report are actionable and shall
3 be adjudicated by this court, but that the claims alleged in the
4 second Card report are not actionable in this suit. The court now
5 turns to Unruh Civil Rights Act and ADA violations alleged by
6 plaintiff.

7 **B. THE UNRUH ACT**

8 Plaintiff seeks summary judgment pursuant to the Unruh Act
9 because his claim is predicated upon defendant's violation of the
10 ADA. Pl.'s Mot. and Opp'n at 2, 20, 23.⁷ He asserts that "a
11 violation of his rights under the ADA is a *per se* violation of his
12 rights under the Unruh Act." *Id.* at 23 (italics in the original).
13 Defendant, however, maintains that plaintiff's claims should be
14 dismissed as moot. They argue that because only injunctive relief
15 may be granted under the ADA, once a plaintiff has received
16 everything the court would order, the claims are moot. Def.'s
17 Repl. at 10. Further, they maintain that because the court has
18 jurisdiction over this case because of the federal claims, the
19 court should refuse to exercise supplemental jurisdiction over the
20 state law claims. Repl. at 10. I do not agree.

21 First, because there remain disputed issues as to a number of
22 the ADA claims, there remains a live controversy as to the federal
23 claims. Thus, the court may still exercise supplemental

24
25 ⁷ Plaintiff pleads in his complaint that his Unruh Act claim
26 is predicated upon the ADA claim. *See* ¶ 63 of Compl. ("The Unruh
Act also specifically incorporates (by reference) an individual's
rights under the ADA").

1 jurisdiction over plaintiff's state law claims. As to defendant's
2 assertion that plaintiff is not entitled to relief once an
3 injunction is inappropriate under the ADA, nothing prevents the
4 court from exercising supplemental jurisdiction even as to those
5 barriers which have been corrected. I now turn to the provisions
6 of the Unruh Act.

7 The Unruh Civil Rights Act, codified in California Civil Code
8 § 51, provides that "[a]ll persons . . . are entitled to full and
9 equal accommodations, advantages, facilities, privileges, or
10 services in all business establishments of every kind whatsoever."
11 Cal. Civ. Code § 51(b). The purpose of the Unruh Act "is to compel
12 a recognition of the equality of citizens in the right to the
13 peculiar service offered" by the entities covered by the acts.
14 Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 737 (1982)(quotation
15 omitted); see also Strother v. Southern California Permanente
16 Medical Group, 79 F.3d 859 (9th Cir. 1996).

17 Prior to 1992, to prove a claim under the Unruh Act plaintiff
18 was required to demonstrate that the facility was in violation of
19 Title 24 and that the discrimination he experienced was
20 intentional. See Harris v. Capital Growth Investors XIV, 52 Cal.3d
21 1142, 1175 (1991)("[W]e hold that a plaintiff seeking to establish
22 a case under the Unruh Act must plead and prove intentional
23 discrimination in public accommodations in violation of the terms
24 of the Act"); Lentini v. California Center for the Arts, 970 F.3d
25 837, 847 (9th Cir. 2004).

26 ////

1 To effectuate its long-stated policy of ridding the state of
2 discrimination, see Warfield v. Peninsula Golf & Country Club, 10
3 Cal.4th 594 (1995), the California legislature amended the Unruh
4 Act in 1992 to broaden the scope of its protection. As amended,
5 § 51 provides that "[a] violation of the right of any individual
6 under the Americans with Disabilities Act of 1990 . . . shall also
7 constitute a violation of this section." Cal. Civ. Code § 51(f).
8 It is pursuant to this subsection that plaintiff seeks to recover.
9 See Pl.'s Compl. at 10-12. Plaintiff claims he was denied his
10 right to "equal and full enjoyment of the premises as provided by
11 the ADA and California law." Plaintiff's expert testified "that
12 said barriers violate ADAAG standards and the CBC [California
13 Building code]." Pl.'s Mot. and Opp'n at 21. While, as a general
14 matter, a plaintiff may rely on both the ADAAG and CBC when
15 pursuing an Unruh claim, the question is whether he may do so where
16 his Unruh claim is based solely on purported violations of the ADA.
17 This issue raises two different questions: Is plaintiff's Unruh
18 claim proceeding only on the amendment allowing recovery under
19 state law for violation of the federal statute? If so, may
20 plaintiff rely on the CBC in doing so? The first question is
21 easily resolved.

22 Nowhere in plaintiff's filings is there any suggestion of
23 intentional discrimination. Accordingly, the only legal theory
24 available to plaintiff on his Unruh claim is that architectural
25 barriers at Home Depot violate the ADA. It does not follow,
26 however, that where relief is barred under the ADA, relief is also

1 barred under the Unruh Act.

2 As I have explained previously, the state legislature, unlike
3 Congress, has provided that an individual may recover damages for
4 a violation of the Unruh Act. The plain language and purpose of
5 the Unruh Act is to provide that individuals need only prove an ADA
6 violation to obtain relief under the statute, not that they must
7 first obtain relief under the federal statute. State law requires
8 a liberal interpretation of the Unruh Act. Isbister v. Boys' Club
9 of Santa Cruz, 40 Cal.3d 72, 75-76 (1985). Because § 51(f) employs
10 broad language, without any indication of an intent to limit
11 recovery, it seems clear that the legislature intended to provide
12 a remedy for individuals who suffered a violation of the ADA but
13 who could not recover under that Act because the conditions
14 justifying injunctive relief no longer obtain. See Hubbard v. Twin
15 Oaks Health and Rehabilitation Center, 408 F.Supp.2d at 928-30. As
16 a result, the court holds that plaintiff may recover under the
17 Unruh Act, even absent relief under the ADA. The second question
18 seems equally straight forward.

19 **C. The CBC and the ADA**

20 At various places throughout plaintiff's brief and the Card
21 reports, reliance is placed on the California Building Code as well
22 as the Manual on Uniform Traffic Devices to assert violations of
23 the ADA. As the parties note, it is clear that the federal statute
24 does not preempt state law where the state law provides "greater
25 or equal protection." 42 U.S.C. § 12201(b). The question here,
26 however, is not whether state law is more protective, but whether

1 a violation of state regulations establishes a barrier for purposes
2 of the ADA. As I explain below, the ADAAG, the Title III Standards
3 promulgated by the Department of Justice, are the exclusive
4 standards by which to establish architectural barriers under Title
5 III.

6 Section 12183(a)(1) of Title 42 provides that a violation is
7 measured by regulations "issued under this subchapter" ⁸
8 Thus, it would appear that ADA violations are directly tied to the
9 ADAAG. See Independent Living Resources v. Oregon Arena Corp., 982
10 F.Supp. 698, 746 (1997)("[t]he implication is that the standards
11 are the exclusive source for design requirements.)"

12 In turn the ADAAG defines "accessible" as "a site, building,
13 facility or portion thereof that complies with these guidelines."
14 ADAAG 3.5 (adopted by the DOJ as Standard 3.5). This language also
15 plainly implies that compliance with the ADAAG, and not another
16 standard, constitutes compliance with the ADA requirements for new
17 construction. ⁹

18 ⁸ The statute provides:

19
20 "a failure to design and construct facilities for first
21 occupancy later than 30 months after July 26, 1990, that
22 are readily accessible to and usable by individuals with
23 disabilities, except where an entity can demonstrate
24 that it is structurally impracticable to meet the
25 requirements of such subsection in accordance with
26 standards set forth or incorporated by reference in
regulations issued under this subchapter"

24 42 U.S.C. § 12183(a)(1).

25 ⁹ Finally, the court notes that because Congress directed
26 that the Department of Justice, in conjunction with the
Architectural and Transportation Barriers Compliance Board ("Access

1 For all of the reasons set forth above, the court concludes
2 that the ADAAG constitutes the exclusive standards under Title III
3 of the ADA.

4 **IV.**

5 **THE MERITS**

6 Title III of the ADA prohibits discrimination against
7 individuals on the basis of disabilities in the full and equal
8 enjoyment of the goods, services, facilities, privileges,
9 advantages or accommodations of any place of public accommodation.
10 See 42 U.S.C. § 12182(a). Title III defines "discrimination" as,
11 among other things, a failure to remove "barriers . . . where such
12 removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv);
13 Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133, 1135 (9th
14 Cir. 2002). Plaintiff avers that defendant discriminated against
15 him when it failed to remove certain architectural barriers at the
16 Home Depot location at issue in this litigation.

17 Under Title III of the ADA, a plaintiff must prove that (1)
18 he has a disability, (2) defendant's facility is a place of public
19 accommodation, (3) and plaintiff was denied full and equal
20 treatment because of his disability. To succeed on an ADA claim
21 of discrimination on account of an architectural barrier, the
22 plaintiff must also prove that (1) the existing facility at the

23 _____
24 Board"), issue the ADAAG, and that these standards constitute
25 binding regulation, the court is not authorized to evaluate Title
26 III disability discrimination claims under any other standard, and
to determine what engineering or architectural modifications are
necessary, or whether such modifications would be feasible and
desirable.

1 defendant's place of business presents an architectural barrier
2 prohibited under the ADA, and (2) the removal of the barrier is
3 readily achievable. See 42 U.S.C. § 12182(b)(2)(A)(iv); see also
4 Pascuiti v. New York Yankees, No. 98 CIV. 8186 (SAS), 1999 WL
5 1102748, at * 5 (S.D.N.Y. Dec.6, 1999) (plaintiff bears the initial
6 burden of proving that barrier removal is readily achievable). If
7 plaintiff satisfies his burdens, the burden shifts to the defendant
8 to show that removal of the barriers is not readily achievable.

9 It is undisputed that Home Depot is a place of public
10 accommodation. Further, plaintiff is disabled because he is a
11 paraplegic who must use a wheelchair to travel in public.
12 Plaintiff thus meets the first two elements of an ADA prima facie
13 case. What remains in dispute is whether plaintiff was
14 discriminated against on account of his disability based on an
15 architectural barrier.

16 **A. ARCHITECTURAL BARRIERS AND STANDARDS GOVERNING NEW**
17 **CONSTRUCTION**

18 Plaintiff contends that defendant violated the ADA by failing
19 to abide by the Department of Justice's Regulations implementing
20 the ADA's public accommodation provisions and the corresponding ADA
21 Accessibility Guidelines ("ADAAG"). These regulations are divided
22 into three categories. The first category require that newly-
23 constructed public accommodations must comply with specific
24 accessibility requirements set forth in the ADAAG. See 28 C.F.R.
25 Pt. 36.401; 28 C.F.R. Pt. 36.406. The second category concerns the
26 accessibility requirements imposed on public accommodations altered

1 after January 26, 1992. See id. The third category requires the
2 removal of architectural barriers in preexisting public
3 accommodations (those designed and constructed for occupancy before
4 January 26, 1993). See 28 C.F.R. Pt. 36.304. Under the ADA's
5 continuing barrier removal obligation, it is discriminatory for
6 owners, operators, lessors or lessees to fail to remove
7 architectural barriers that deny disabled persons the goods and
8 services offered to the general public. See Hubbard v. Twin Oaks
9 Health and Rehabilitation Center, 408 F.Supp.2d 923, 930 (E.D. Cal.
10 2004)(citing Parr v. L & L Drive-Inn Restaurant, 96 F.Supp.2d 1065,
11 1086 (D. Haw. 2000)).

12 For purposes of the ADA, the Home Depot facility at issue
13 falls within the first category described, as the building was
14 constructed in 1998 and first opened for business on August 27,
15 1998.¹⁰ The ADA requires that newly-constructed facilities be
16 "readily accessible and usable by individuals with disabilities."
17 See 42 U.S.C. § 12183(a)(1). This command to build accessible
18 facilities is excepted only if meeting the requirements of the Act
19 would be "structurally impracticable." Id.¹¹; See also Long v.

20
21 ¹⁰ On April 6, 2006, the court ordered the parties to submit
22 evidence as to when the facility at issue in this litigation was
23 built. On behalf of the parties, plaintiff's counsel submitted a
24 verified response to plaintiff's interrogatories which states that
25 "[d]efendant does not believe that there have been 'alterations'
26 to the store since its initial construction," and that "[t]he
building was constructed in 1998 and opened for business on August
27, 1998." Response to Interrogatory Nos. 7 and 8.

25 ¹¹ See also 28 C.F.R. Pt. 36.401(c) (structural
26 impracticability means "those rare circumstances where the unique
characteristics of the terrain prevent the incorporation of

1 Coast Resorts, Inc., 267 F.3d 918, 923 (9th Cir. 2001) ("We need not
2 decide whether the ADA forecloses the possibility that a court
3 might exercise its equitable discretion in fashioning relief for
4 violations of § 1283(a) . . . because there is no room for
5 discretion even if it exists")(citation omitted)).

6 Below, the court addresses the thirteen ADA violations alleged
7 in the complaint, which plaintiff moves on in his summary
8 judgment motion, as well as the violations identified by Joe Card
9 in the first expert report.

10 **B. ADA VIOLATIONS IDENTIFIED IN THE COMPLAINT**

11 **1. Barriers Which Have Been Remedied**

12 Because under the ADA only injunctive relief may be granted
13 to a private party, 42 U.S.C. § 2000a-3(A); see also Wander v.
14 Kaus, 304 F.3d 856, 858 (9th Cir. 2002), once a plaintiff has
15 received everything the court would order, the federal claims are
16 moot. Independent Living Resources v. Oregon Arena Corp., 982
17 F.Supp. 698, 771 (1997); Dufresne v. Veneman, 114 F.3d 952, 953-954
18 (9th Cir. 1997) (finding plaintiffs' suit moot when spraying they
19 sought to stop was completed before resolution of the suit). Thus,
20 generally, a defendant's successful remedial efforts will render
21 a plaintiff's ADA suit subject to dismissal as moot. Pickern v.
22 Best Western Cove Lodge Marina Resort, 194 F.Supp.2d 1128, 1130
23 (E.D. Cal. 2002).

24 ////

25 _____
26 accessibility features.").

1 The parties do not dispute that five of the thirteen barriers
2 complained of in the complaint have been remedied: (1) The tow-
3 away sign has been replaced and the number is now 2 ½" tall, Def.'s
4 SUF 5; (2) Home Depot has painted "No Parking" on the pavement of
5 the access aisles to the van accessible parking lots, Def.'s 7; (3)
6 The ISA signage on the entrance door at all three entrances to the
7 store is now placed 60" above the ground, Def.'s SUF 8; (4) Home
8 Depot installed a U-shaped handle on the designated accessible
9 stall door in the men's restroom, Def.'s SUF 13; and (5) The toilet
10 paper dispenser in the men's restroom has been positioned so that
11 it does not protrude more than four inches from the wall, Def.'s
12 SUF 14. Home Depot's remedial efforts renders Eiden's ADA claims
13 as to these barriers moot.¹²

14 **2. Detectable Warnings at Travel Routes**

15 Plaintiff seeks relief as to a barrier that is not related
16 to his personal disability of non-mobility. In his complaint,
17 Eiden alleges that "[t]here are no detectable warnings at the route
18 for a person in a wheelchair traveling through vehicle areas to
19 reach the ramp," citing ADAAG 4.29.5, Detectable Warnings at
20 Hazardous Vehicular Areas. Compl., Ex. A at 4; Card Dec., Ex. B,
21 Part 1. Eiden, however, has not suffered an "injury in fact" due
22 to the absence of detectible warnings because it is undisputed that
23 he is not visually impaired and that such accommodations are

24
25 ¹² As the court noted previously in this order, plaintiff may
26 recover under the Unruh Act for damages even absent relief under
the ADA for violations which were rendered moot by Home Depot's
remedial efforts.

1 reserved for the visually impaired. Def.'s SUF 16.¹³ Eiden lacks
2 standing to assert this claim. See Access Now, Inc. v. South
3 Florida Stadium Corp., 161 F.Supp.2d 1357, 1364 (S.D. Fla. 2001)
4 ("To the extent that Plaintiffs complain about violations that
5 would discriminate against blind or deaf persons, or any
6 disabilities other than that suffered by Plaintiff Resnick, they
7 lack standing to pursue such claims."); Martinez v. Longs Drug
8 Stores, Inc., 2005 WL 2072013, *2 (E.D. Cal. 2005).

9 Standing is limited to claims for which the plaintiff is
10 "among the injured." Lujan v. Defenders of Wildlife, 504 U.S. 555,
11 560-561 (1992). While the statute requires plaintiff's assertion
12 that the defendant must be in compliance with the ADA regulations,
13 allowing plaintiff to sue on behalf of all the disabled would
14 extend beyond the limitations of Article III because plaintiff
15 cannot ultimately prove "injury in fact" as to this barrier which
16 does not affect him. A plaintiff must have a "personal stake in
17 the outcome" sufficient to "assure that concrete adverseness which

18
19 ¹³ The relevant ADAAG section provides the a detectable
20 warning is defined as a standardized surface feature built in or
21 applied to walking surfaces or other elements to warn visually
22 impaired people of hazards on a circulation path." 28 C.F.R. Pt.
23 36, App. A ADAAG 3.5.

24 Section 4.29.2 of the ADAAG states that:

25 Detectable warnings shall consist of raised truncated
26 domes with a diameter of nominal 0.9 in (23 mm), a
height of nominal 0.2 in (5 mm) and a center-to-center
spacing of nominal 2.35 in (60 mm) and shall contrast
visually with adjoining surfaces, either light-on-dark,
or dark-on-light (emphasis supplied).

These sections clearly pertain to those who are visually impaired.

1 sharpens the presentation of issues upon which the court so largely
2 depends for illumination of difficult . . . questions." Baker v.
3 Carr, 369 U.S. 186, 204 (1962). Accordingly, the court holds that
4 this claim must be DISMISSED due to lack of standing.

5 **3. Cross-Slope of Wheelchair Route**

6 Defendant moves for summary judgment as to all the barriers
7 alleged in plaintiff's complaint, but say nothing at all about this
8 particular allegation. Plaintiff maintains in his complaint that
9 the cross-slope of the [wheelchair route] exceeds 2%, and that it
10 is actually 7.3%, in violation of the ADAAG 4.3.7.¹⁴ Plaintiff's
11 expert report includes pictures of various cross slopes which
12 exceed the allowable 2% slope pursuant to the ADAAG. Card Dec.,
13 Ex. B, Part 3.

14 Under summary judgment practice, the moving party "[a]llways
15 bears the initial responsibility of informing the district court
16 of the basis for its motion, and identifying those portions of "the
17 pleadings, depositions, answers to interrogatories, and admissions
18 on file, together with the affidavits, if any," which it believes
19 demonstrate the absence of a genuine issue of material fact.
20 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Because
21 defendant has failed to meet its burden of informing the court of

22 ¹⁴ Section 4.3.1 provides that "[a]ll walks, halls,
23 corridors, aisles, skywalks, tunnels, and other spaces that are
24 part of an accessible route shall comply with 4.3."

25 Section 4.3.7 of the ADAAG, which applies specifically to this
26 allegation, provides that "[a]n accessible route with a running
slope greater than 1:20 is a ramp and shall comply with 4.8.
Nowhere shall the cross slope of an accessible route exceed 1:50."

1 the basis for its motion as to this "barrier," and because
2 plaintiff has tendered evidence apparently showing that there is
3 an ADAAG violation with respect to the cross-slope, plaintiff's
4 motion with respect to this barrier is GRANTED.

5 **4. Directional Signage Along the Route of Travel**

6 Plaintiff alleges in his complaint that defendant is not in
7 compliance with the ADAAG because "[t]here is no directional
8 signage along the route of travel from the public streets or
9 sidewalks to the building entrance." Compl., Ex. A at 3, citing
10 ADAAG 4.1.2 (7). The cited section, however, does not discuss
11 directional signage along routes of travel from public streets or
12 sidewalks to the building entrance, but rather relates to building
13 signage.¹⁵ Because plaintiff has failed to meet its burden of
14

15 ¹⁵ This section provides as follows:

16 (7) Building Signage. Signs which designate permanent
17 rooms and spaces shall comply with 4.30.1, 4.30.4,
18 4.30.5 and 4.30.6. Other signs which provide direction
19 to, or information about, functional spaces of the
20 building shall comply with 4.30.1, 4.30.2, 4.30.3, and
21 4.30.5. Elements and spaces of accessible facilities
22 which shall be identified by the International Symbol of
23 Accessibility and which shall comply with 4.30.7 are:

24 (a) Parking spaces designated as reserved for
25 individuals with disabilities;

26 (b) Accessible passenger loading zones;

(c) Accessible entrances when not all are accessible
(inaccessible entrances shall have directional signage
to indicate the route to the nearest accessible
entrance);

(d) Accessible toilet and bathing facilities when not
all are accessible.

1 informing the court of the basis for its motion as to this barrier,
2 the court determines that defendant has not violated this section
3 of the ADAAG. Defendant's motion for summary judgment as to this
4 alleged barrier must GRANTED.

5 **5. Barriers Where Disputed Facts Remain**

6 **a. Parking Spaces Closest to Entrance**

7 In his complaint, plaintiff alleges that "[t]he accessible
8 parking spaces are not dispersed and located closest to the
9 accessible entrances" and that "[t]here are no disabled parking
10 spaces next to the garden entrance," in violation of ADAAG 4.6.2.¹⁶
11 Compl., Ex. A at 5 (Picture 8). Home Depot moves for summary
12 judgment asserting that "twelve (12) accessible parking spaces have
13 been installed at the closet location to the *main entrance* of the
14 Store." Def.'s Mot. at 5. This appears to be undisputed. Whether
15 there exists accessible parking spaces located at the entrances to
16 the *nursery/garden area*, however, remains in dispute. Because the
17 court is unable to determine based on plaintiff's evidence whether
18 the garden area entrance contains parking spaces, see picture #8,
19 Ex. A to Compl., the parties' motions must be DENIED as to this
20 alleged barrier.

21 ////

22 ////

23 ¹⁶ This section provides that:

24
25 In buildings with multiple accessible entrances with
26 adjacent parking, accessible parking spaces shall be
dispersed and located closest to the accessible
entrances.

1 **b. Sales Counter Height**

2 Plaintiff maintains that "[t]he sales counter is 44 inches in
3 height at the customer service desk," in violation of the ADAAG
4 § 7.2(1).¹⁷ See Compl., Ex. A at 9. Home Depot contests this,
5 maintaining that all counters are 36 inches above the floor. Boggs
6 Dec. ¶ 8. Plaintiff's expert, Joe Card, maintains that the
7 Customer Service Counter is not accessible with respect to height.
8 Card Dec. ¶ 8(p). Because there is a disputed issue of material
9 with regard to this barrier, the parties' motions as to this
10 barrier are DENIED.

11 **c. Accessible Check Stands and Signage Identifying**
12 **Accessible Checkout Aisle**

13 Plaintiff asserts that "[t]here was [sic] no accessible check
14 stands and that the "[s]ignage identifying accessible checkout
15 aisle was not mounted on any checkout locations, in violation of

16 ////

17 ////

18 ¹⁷ Section 7.2(1) provides that:

19 In areas used for transactions where counters have cash
20 registers and are provided for sales or distribution of
21 goods or services to the public, at least one of each
22 type shall have a portion of the counter which is at
23 least 36 in (915mm) in length with a maximum height of
24 36 in (915 mm) above the finish floor. It shall be on an
25 accessible route complying with 4.3. Such counters shall
26 include, but are not limited to, counters in retail
stores, and distribution centers. The accessible
counters must be dispersed throughout the building or
facility. In alterations where it is technically
infeasible to provide an accessible counter, an
auxiliary counter meeting these requirements may be
provided.

1 ADAAG § 7.3.3.¹⁸ Compl., Ex. A at 10. In the course of this
2 litigation, Home Depot claims that it mounted ISA signage above
3 three (3) of its thirteen (13) checkstands. Boggs Dec. ¶ 7. This
4 section of the ADAAG, however, also requires "accessible" checkout
5 aisles. Plaintiff maintains that although there were signage
6 indicating accessibility, during his visit to Home Depot no
7 accessible check stands were open to him. Pl.'s Opp'n at 17.
8 Defendant maintains that it has a policy of keeping checkstand one
9 open at all times. Def.'s SUF 11. The parties' tendered evidence
10 demonstrates that a genuine issue of material fact is in dispute
11 as to whether at least one accessible checkout aisle was available
12 to plaintiff when he visited Home Depot. The parties' motions as
13 to this barrier are DENIED.

14 **d. Movable Obstructions**

15 Two of Eiden's claims involve movable obstructions. Plaintiff
16 alleges that shopping carts were left in disabled parking spaces
17 and access aisles creating an obstruction for wheelchair users in
18 violation of the ADAAG. Compl., Ex. A at 5. He also avers that
19 some aisles in the store were obstructed by merchandise narrowing
20 the width of the aisles. Compl., Ex. A at 7. Defendant argues,
21 however, that movable objects are not governed by the ADAAG.
22 Plaintiff fails to cite any authority for the proposition that
23 movable objects, such as shopping carts or merchandise in the

24 ¹⁸ Section 7.7.3 states that "[s]ignage identifying
25 accessible check-out aisles shall comply with 4.30.7 and shall be
26 mounted above the check-out aisle in the same location where the
check-out number or type of check-out is displayed."

1 aisles, falls within the ambit of the ADAAG. Defendant, however,
2 cites authority that is inapposite to the issue at bar. Lieber v.
3 Macy's West, 80 F.Supp.2d 1065 (N.D. Cal 1999)(Patel, J.), does not
4 stand for the proposition that the ADA does not govern movable
5 objects, but that the ADA does not address access to merchandise
6 located on movable display racks.

7 Neither the ADA nor the ADAAG addresses movable objects. The
8 statute's implementing regulations explicitly require, however,
9 that "[p]ublic accommodations are required to maintain those
10 features of their facilities that need to be readily accessible to
11 people with disabilities." See 28 C.F.R. Pt. 36.211(a). The
12 regulations also state that "[i]solated or temporary interruptions
13 in access due to maintenance or repairs are not prohibited." See
14 Pt. 36.211(b). The regulations appear to suggest that although
15 defendants such as Home Depot are required to maintain ready
16 accessibility, they would not be liable for "isolated" or
17 "temporary" movable objects which temporarily restrict access where
18 the barrier is caused by maintenance or repair.

19 The Justice Department has also determined that regular use
20 of an accessible route for storage of supplies would violate Title
21 III, but an isolated instance of placement of an object in an
22 accessible route is not a violation if the object is promptly
23 removed. See United States Department of Justice, Civil Rights
24 Division, The Americans with Disabilities Act: Title III Technical
25 Assistance Manual § III-3.7000 (1993); see also Bragdon, 524 U.S.
26 624, 646 (citing Technical Assistance Manual and noting that

1 Justice Department's views entitled to deference).

2 Two cases which have addressed this issue, a Colorado Court
3 of Appeals case and an unpublished New Hampshire District Court
4 case, have both held that isolated failures to maintain access
5 routes or parking spaces, without more, are not covered by the ADA.
6 See Tanner v. Wal-Mart Stores, Inc., 2000 DNH 34 (D. N.H. 2000)
7 (isolated incident of failure to remove shopping carts does not
8 constitute a Title III violation); Pack v. Arkansas Valley
9 Correctional Facility, 849 P.2d 34, 38 (Colo Ct. App. 1995)
10 (isolated instance of negligence regarding failure to remove ice
11 and snow from handicapped parking zone not an ADA violation). Home
12 Depot argues that it has a "long-standing, widely-disseminated and
13 enforced written policy of maintaining an accessible route of at
14 least 32 inches throughout the store." Def.'s Mot. at 5; Def.'s
15 SUF 3. Eiden argues that "policy or no policy, [the policy] is not
16 enforced" and asserts that he has experienced "blocked paths of
17 travel." Disputed facts remain as to whether Home Depot had a
18 practice of failing to remove obstructions from accessible routes
19 of travel or parking spaces. The parties' motions as to the
20 movable obstructions are DENIED.

21 **e. Alleged Barriers Identified in the First Card Report**

22 As the court explained above, only the allegations contained
23 in the first Card report (filed with the court on September 12,
24 2005) are actionable. The court has carefully examined the Card
25 report and plaintiff's papers, and although the Card report listed
26 twenty-three violations, only about half of those violations are

1 new ones, not already contained in plaintiff's complaint and thus
2 discussed above in this order. The new violations are described
3 in 7 (a), (b), (c), (d), (g), (i), (p), (q), (r), (s), (t), (v),
4 and (w) of Joe Card's declaration.

5 Although plaintiff moves on all alleged barriers contained in
6 the complaint and the Card reports, only five of the violations
7 contained in the first Card report are even mentioned in
8 plaintiff's papers, and plaintiff appears to have tendered evidence
9 only with regard to these barriers. Given the large number of
10 exhibits and the lengthy briefs filed by the parties, the court has
11 already expended an excessive amount of time adjudicating the
12 claims made by the parties, which they often fail to address in a
13 careful and orderly manner. As has been said, "[j]udges are not
14 like pigs, hunting for truffles buried in' the record."

15 Albrechtsen v. Board of Regents of University of Wisconsin System,
16 309 F.3d 433, 436 (7th Cir. 2002) (quoting United States v. Dunkel,
17 927 F.2d 955, 956 (7th Cir. 1991)). Under the circumstances, the
18 court will only address the barriers discussed by plaintiff in his
19 motion for summary judgment and opposition brief, and only the
20 alleged barriers where evidence is tendered. See Pl.'s Mot. and
21 Opp'n at 5-6.¹⁹ As discussed further below, for various reasons,

22
23 ¹⁹ These violations are described by Joe Card in his 7(a),
24 (b), (c), and (d) of his September 12, 2005 declaration.
25 Unfortunately, because defendant argues that plaintiff lacks
26 standing to even move on allegations contained in the Card report,
their papers fail to discuss these allegations. Defendant,
however, argues in its response to plaintiff's statement of
undisputed facts ("SUF"). While hardly the appropriate place, the
court will consider the arguments defendant made in its response

1 the court must DENY plaintiff's motion as to these claims and GRANT
2 defendant's motion.

3 **i. Towaway Signage**

4 Plaintiff argues that tow-away signage must be provided
5 adjacent to the disabled parking and must have the proper
6 information. Plaintiff argues that the sign's "reclaim information
7 is not in reflective white letters," citing CBC § 2-7102(d) and
8 D.O.T. § R1008B. Pl.'s Mot. and Opp'n at 6. As defendant rightly
9 notes, plaintiff only cites to the California Building Code and the
10 Manual on Uniform Traffic Devices which the court determined above
11 was improper under the plaintiff's pleadings. Accordingly,
12 plaintiff's motion is DENIED and defendant's motion is GRANTED as
13 to this alleged barrier.

14 **ii. Accessible Parking Signage**

15 Plaintiff maintains that the sign stating that the space is
16 van accessible violates ADAAG § 4.6.4 in that it must be mounted
17 below the International Sign of Accessibility ("I.S.A."), and that
18 the accessible parking signage "is not mounted at a height of
19 minimum of 80 inches, when the sign is in a path of travel as
20 required by ADAAG § 4.2.2." Pl.'s Mot. and Opp'n at 6. Defendant
21 takes issue with these allegations. The court has examined
22 defendant's exhibits, and in fact, defendant has provided blue and
23 white ISA signage stating "Van Accessible." Further, the words
24 "Van Accessible" are mounted below the I.S.A. See Boggs Dec. at

25 _____
26 SUF.

¶ 4 and Ex. B. Plaintiff's motion as to this barrier is DENIED and defendant's motion is GRANTED.

As to the allegation that the accessible parking signage is not mounted at a height of 80 inches, plaintiff cites to ADAAG § 4.2.2. However, that section of the ADAAG refers to "Width for Wheelchair Passing."²⁰ Because plaintiff has failed to tender evidence suggesting that defendant has violated that particular section of the ADAAG, as he must, plaintiff's motion is DENIED as to that barrier, and defendant's motion is GRANTED.

iii. ISA on Exit Doors

Plaintiff avers that at exit doors throughout the store, the "I.S.A. that is provided is not a white figure on a blue background as required by CBC § 1117B.5.8.1," citing SUF 23. The allegation only addresses the California Building Code. Accordingly, plaintiff's motion as to this alleged barrier must be DENIED and defendant's motion must be GRANTED.

iv. ISA Signage for Restroom

Finally, plaintiff contends that defendant has violated § 4.30.6 of the ADAAG by not mounting the ISA signage on the wall adjacent to the restroom door, not on the door itself.²¹ Pl.'s

²⁰ That section of the ADAAG states that "[t]he minimum width for two wheelchairs to pass is 60 in (1525 mm)."

²¹ Section 4.30.6 of the ADAAG states:

Where permanent identification is provided for rooms and spaces, signs shall be installed on the wall adjacent to the latch side of the door. Where there is no wall space to the latch side of the door, including at double leaf doors, signs shall be placed on the nearest adjacent

1 Mot. and Opp'n at 6. The court must DENY plaintiff's motion and
2 GRANT defendant's motion as to this alleged barrier because, as
3 defendant argues, this ADAAG requirement applies to those who are
4 blind. Plaintiff's disability is his immobility. As the court
5 explained in the analysis pertaining to "Detectable Warnings at
6 Travel Routes," standing is limited to claims for which the
7 plaintiff is "among the injured." Lujan v. Defenders of Wildlife,
8 504 U.S. 555, 560-561 (1992). Defendant's motion must be GRANTED
9 as to this barrier and plaintiff's motion must be DENIED.


10 V.

11 CONCLUSION

12 The parties' motions are GRANTED in part and DENIED in part
13 as specified above.²²

14 IT IS SO ORDERED.

15 DATED: May 24, 2006.

16 
17 LAWRENCE K. KARLTON
18 SENIOR JUDGE
19 UNITED STATES DISTRICT COURT

20 wall. Mounting height shall be 60 in (1525 mm) above the
21 finish floor to the centerline of the sign. Mounting
22 location for such signage shall be so that a person may
23 approach within 3 in (76 mm) of signage without
24 encountering protruding objects or standing within the
25 swing of a door.

26 ²² Plaintiff requests from the court a final judgment of
\$20,000.00 in statutory damages pursuant to the Unruh Act (five
visits multiplied by the statutory minimum of \$4,000.000 per
visit). See Pl.'s Mot. and Opp'n at 23. Because there remain
disputed facts as to the violations upon which plaintiff predicates
his Unruh Act claims, it is inappropriate at this time to determine
the award of damages.